

**THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Applicant(s): Kruik et al.
Appl. No.: 10/820,880
Conf. No.: 9267
Filed: April 9, 2004
Title: COATING AND COMPOSITE FROZEN CONFECTIONS
Art Unit: 1761
Examiner: Tran Lien, Thuy
Docket No.: 112701-584

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPELLANTS' APPEAL BRIEF

Sir:

Appellants submit this Appeal Brief in support of the Notice of Appeal filed on June 7, 2007. This Appeal is taken from the Final Rejection in the Office Action dated February 7, 2007 and the Advisory Action dated May 15, 2007.

I. REAL PARTY IN INTEREST

The real party in interest for the above-identified patent application on Appeal is Nestec S.A. by virtue of an Assignment dated July 6, 2004 and recorded at reel 014820, frame 0541 in the United States Patent and Trademark Office.

II. RELATED APPEALS AND INTERFERENCES

Appellants' legal representative and the Assignee of the above-identified patent application do not know of any prior or pending appeals, interferences or judicial proceedings which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision with respect to the above-identified Appeal.

III. STATUS OF CLAIMS

Claims 1 and 6-21 are pending in the above-identified patent application. Claims 2-5 were previously canceled. Claims 1 and 6-21 stand rejected. Therefore, Claims 1 and 6-21 are being appealed in this Brief. A copy of the appealed claims is included in the Claims Appendix.

IV. STATUS OF AMENDMENTS

A Final Office Action was mailed on February 7, 2007. Appellants filed a Response on May 3, 2007 in reply to the Final Office Action. An Advisory Action was mailed on May 15, 2007. In the Advisory Action, the Examiner maintained the obviousness rejections. A copy of the Final Office Action and the Advisory Action are attached as Exhibit A and Exhibit B, respectively, in the Evidence Appendix.

V. SUMMARY OF CLAIMED SUBJECT MATTER

A summary of the invention by way of reference to specification and/or figures for each of the independent claims is provided as follows:

Independent Claim 1 is directed to a biscuit mass that has the appearance of a biscuit at a temperature of -10°C or below, but which is a liquid at a temperature of 15°C or above (page 2, lines 15-17), and which keeps its biscuit consistency on storage at temperatures suitable for ice confections and upon subsequent consumption (page 2, lines 17-19), comprising a mixture consisting essentially of particles of baked biscuit and at least one fat (page 3, lines 1-5), wherein the fat is selected from the group consisting of partially hydrogenated vegetable oil, unmodified coconut fat, fractionated palm oil, partly fractionated milk fat and mixtures thereof (page 3, lines 1-5), wherein the mixture contains 20 to 60% by weight of the biscuit particles and 40 to 80% by weight of the fat (page 2, lines 31-34) and wherein the fat has a solid fat content of about 95% at 10°C and about 0% at 25°C (page 10, lines 15-16).

Independent Claim 16 is directed to a process for manufacturing a composite frozen confection comprising a biscuit mass as a coating, core or inclusion and ice confectionery (page 2, lines 22-24), which comprises reducing a biscuit or biscuit crumbs to a particulate form (page 2, lines 24-28), admixing the resulting particles with a fat at a temperature of between 25°C and 35°C to form a homogeneous mass consisting essentially of particles of baked biscuit and at least one fat (page 2, lines 24-28), and bringing the ice confectionery and the biscuit mass into contact to form the composite confection (page 2, lines 24-28).

Although specification citations are given in accordance with C.F.R. 1.192(c), these reference numerals and citations are merely examples of where support may be found in the specification for the terms used in this section of the Brief. There is no intention to suggest in any way that the terms of the claims are limited to the examples in the specification. As demonstrated by the reference numerals and citations, the claims are fully supported by the specification as required by law. However, it is improper under the law to read limitations from the specification into the claims. Pointing out specification support for the claim terminology as is done here to comply with rule 1.192(c) does not in any way limit the scope of the claims to those examples from which they find support. Nor does this exercise provide a mechanism for circumventing the law precluding reading limitations into the claims from the specification. In

short, the reference numerals and specification citations are not to be construed as claim limitations or in any way used to limit the scope of the claims.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

1. Claims 1 and 6-21 are rejected under 35 U.S.C. 103(a) as being as unpatentable over Canadian Patent No. 950750 to Hegadorn et al. ("*Hegadorn*"). A copy of *Hegadorn* is attached herewith as Appendix C.

VII. ARGUMENT

A. LEGAL STANDARDS

Obviousness under 35 U.S.C. § 103

The Federal Circuit has held that the legal determination of an obviousness rejection under 35 U.S.C. § 103 is:

whether the claimed invention as a whole would have been obvious to a person of ordinary skill in the art at the time the invention was made...The foundational facts for the prima facie case of obviousness are: (1) the scope and content of the prior art; (2) the difference between the prior art and the claimed invention; and (3) the level of ordinary skill in the art...Moreover, objective indicia such as commercial success and long felt need are relevant to the determination of obviousness...Thus, each obviousness determination rests on its own facts.

In re Mayne, 41 U.S.P.Q. 2d 1451, 1453 (Fed. Cir. 1997).

In making this determination, the Patent Office has the initial burden of proving a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q. 2d 1955, 1956 (Fed. Cir. 1993). This burden may only be overcome “by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings.” *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q. 2d 1596, 1598 (Fed. Cir. 1988). “If the examination at the initial stage does not produce a prima facie case of unpatentability, then without more the applicant is entitled to grant of the patent.” *In re Oetiker*, 24 U.S.P.Q. 2d 1443, 1444 (Fed. Cir. 1992).

Of course, references must be considered as a whole and those portions teaching against or away from the claimed invention must be considered. *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve Inc.*, 796 F.2d 443 (Fed. Cir. 1986). “A prior art reference may be considered to teach away when a person of ordinary skill, upon reading the reference would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the Applicant.” *Monarch Knitting Machinery Corp. v. Fukuhara Industrial Trading Co., Ltd.*, 139 F.3d 1009 (Fed. Cir. 1998), quoting, *In re Gurley*, 27 F.3d 551 (Fed. Cir. 1994).

B. THE CLAIMED INVENTION

Independent Claim 1 recites, in part, a biscuit mass that has the appearance of a biscuit at a temperature of -10° C or below, but which is a liquid at a temperature of 15° C or above, and which keeps its biscuit consistency on storage at temperatures suitable for ice confections and upon subsequent consumption. The biscuit mass consists essentially of particles of baked biscuit and at least one fat. The fat is selected from the group consisting of partially hydrogenated vegetable oil, unmodified coconut fat, fractionated palm oil, partly fractionated milk fat and mixtures thereof. The mixture contains 20 to 60% by weight of the biscuit particles and 40 to 80% by weight of the fat. The fat has a solid fat content of about 95% at 10° C and about 0% at 25° C.

Independent Claim 16 recites, in part, a process for manufacturing a composite frozen confection comprising a biscuit mass as a coating, core or inclusion and ice confectionery. The process comprises reducing a biscuit or biscuit crumbs to a particulate form, admixing the resulting particles with a fat at a temperature of between 25° C and 35° C to form a homogeneous mass consisting essentially of particles of baked biscuit and at least one fat, and bringing the ice confectionery and the biscuit mass into contact to form the composite confection.

C. THE REJECTION OF CLAIMS 1 AND 6-21 UNDER 35 U.S.C. §103(a) SHOULD BE REVERSED BECAUSE THE EXAMINER HAS NOT ESTABLISHED A *PRIMA FACIE* CASE OF OBVIOUSNESS

Appellants respectfully submit that the obviousness rejection of Claims 1 and 6-21 should be reversed because the Examiner has failed to establish a *prima facie* case of obviousness. In the Office Action, the Examiner alleged that *Hegadorn* renders the claimed subject matter obvious. However, the Examiner fails to establish a *prima facie* case of obviousness in each rejection because there exists no reason that the skilled artisan would have modified the cited reference to arrive at the presently claimed subject matter. Moreover, the cited reference fails to teach or suggest every element of the presently claimed subject matter. Further, in many instances, the Examiner has not even attempted to provide specific support from the cited

reference for many novel elements of the presently claimed subject matter, and even admits the deficiencies of the cited reference. See, Office Action, page 2, lines 9-14.

1. There exists no reason for the skilled artisan to modify *Hegadorn* to arrive at the presently claimed subject matter as *Hegadorn* teaches away from same

Independent Claim 1 recites, in part, a biscuit mass comprising a mixture consisting essentially of particles of baked biscuit and at least one fat, the mixture contains 20 to 60% by weight of the biscuit particles and 40 to 80% by weight of the fat. Independent Claim 16 recites, in part, a process for manufacturing a composite frozen confection comprising bringing an ice confectionery and a biscuit mass consisting essentially of particles of baked biscuit and at least one fat into contact to form the composite confection. In contrast, Appellants respectfully submit that *Hegadorn* is deficient with respect to the present claims.

An advantage of an embodiment of the present invention is to provide a biscuit mass that looks like a biscuit at -10 °C or below, but is liquid from 15 °C or above, and which can be processed with an ice confectionery as a coating, core or inclusion. For example, the biscuit mass consists essentially of a mixture of baked biscuit particles and a fat and maintains its biscuit-like consistency on storage at low temperatures and consumption. In addition, the present claims provide the advantage that there is no emulsion of the fat with an aqueous phase containing sugar and no dramatic increase of the viscosity of the mass as in the case, for example, where fat is mixed with water and sugar. This enables the liquid formulation of the present claims to be processed in regular ice confection coating or injection operations.

In view of the advantages of the present invention, Appellants respectfully submit that *Hegadorn* teaches away from the present claims. Moreover, if the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there exists no reason for the skilled artisan to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984). This certainly applies here, where the cited reference is directed to a product that is intended to be baked.

For example, *Hegadorn* is entirely directed to a mix used for a pre-baked crust that simulates a baked pie crust and is suitable for baking to form a harder crust. See, *Hegadorn*, page 2, lines 15-21. For *Hegadorn*'s mix to be suitable for baking, *Hegadorn* teaches using a

higher amount of pastry crumbs, a lower amount of fat and preferably a binder (to keep food components together), which distinguishes it from the present invention as discussed herein above. See, *Hegadorn*, page 5, lines 8-12. *Hegadorn* is also completely unconcerned with a biscuit mass capable of being used at lower temperatures (e.g., freezing) in a composite ice confectionery, which has different mixture requirements. Further, since *Hegadorn* is directed toward a baked product, which is more likely to be susceptible to moisture that can affect the ability of the product to maintain crispiness in the presence of, for example, iced confectioneries. See, specification, page 1, lines 27-31. This is in contrast to the instant biscuit mass that is capable of maintaining a biscuit consistency on storage at temperatures suitable for ice confections and upon consumption. As a result, the process and characteristics for making the product of *Hegadorn* and the claimed biscuit mass is important and specific to each particular product. Accordingly, *Hegadorn* teaches away from the present invention, and the skilled artisan would have no reason to modify the cited reference to arrive at the present claims.

Appellants also respectfully disagree with the Examiner's assertion that it would have been obvious to vary the fat content of the mix in *Hegadorn* when desiring to alter the taste, texture or consistency of the mixture. In fact, *Hegadorn* explicitly teaches that its mix has from 7% to 25% fat, which teaches away from Claim 1. The reason *Hegadorn* uses a smaller percentage of fat is because its product is intended to be baked and therefore a reduced amount of fat is necessary. Moreover, *Hegadorn* highly prefers using additional ingredients such as a binder to help produce a firmer baked crust.

For at least the reasons discussed above, the modification of cited reference is improper and, thus, fails to render the claimed subject matter obvious. Accordingly, Appellants respectfully submit that the obviousness rejections are improper and that the cited references do not render the present claims obvious.

2. *Hegadorn* fails to disclose each and every limitation of the presently claimed subject matter

Appellants also respectfully submit that, even if modification of *Hegadorn* is proper, *Hegadorn* is deficient with respect to the present claims because it fails to disclose each and every element of the presently claimed subject matter. For example, independent Claim 1

recites, in part, a biscuit mass comprising a mixture consisting essentially of particles of baked biscuit and at least one fat, the mixture contains 20 to 60% by weight of the biscuit particles and 40 to 80% by weight of the fat. Further, independent Claim 16 recites, in part, a process for manufacturing a composite frozen confection comprising bringing an ice confectionery and a biscuit mass consisting essentially of particles of baked biscuit and at least one fat into contact to form the composite confection.

In contrast, Appellants respectfully submit that *Hegadorn* fails to disclose or suggest every element of Claims 1 and 6-21. For example, *Hegadorn* fails to disclose or suggest a biscuit-like mass comprising a mixture consisting essentially of particles of baked biscuit and 40 to 80% by weight of fat as required, in part, by Claim 1. *Hegadorn* also fails to disclose or suggest a process for manufacturing a composite frozen confection comprising bringing an ice confectionery and a biscuit mass consisting essentially of particles of baked biscuit and at least one fat into contact to form the composite confection as required, in part, by Claim 16. In fact, as discussed herein above, the baked product of *Hegadorn* would likely be more susceptible to penetration by moisture contained in an ice confectionery, thereby resulting in a product that is unable to maintain a biscuit consistency during storage and consumption as required, in part, by the presently claimed subject matter. For at least the reasons discussed above, *Hegadorn* does not teach, suggest, or even disclose the present claims, and thus, fails to render the claimed subject matter obvious.

For the reasons discussed above, the modification of the cited reference is improper. Moreover, even if the modification is proper, the cited reference does not teach, suggest, or even disclose all of the elements of Claims 1 and 6-21, and thus, fails to render the claimed subject matter obvious for at least these reasons.

Therefore, for the reasons discussed above, Appellants respectfully submit that Claims 1 and 6-21 are novel, nonobvious and distinguishable from the cited reference and are in condition for allowance.

VIII. CONCLUSION

Appellants respectfully submit that the Examiner has failed to establish a *prima facie* case of obviousness under 35 U.S.C. §103(a) with respect to the rejections of Claims 1 and 6-21. Accordingly, Appellants respectfully submit that the obviousness rejections are erroneous in law and in fact and should, therefore, be reversed by this Board.

The Director is authorized to charge \$500 for the Appeal Brief and any additional fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-584 on the account statement.

Respectfully submitted,

BELL, BOYD & LLOYD LLC

BY 

Robert M. Barrett
Reg. No. 30,142
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Dated: August 2, 2007

CLAIMS APPENDIX

PENDING CLAIMS ON APPEAL OF U.S. PATENT APPLICATION SERIAL NO. 10/820,880

1. A biscuit mass that has the appearance of a biscuit at a temperature of -10° C or below, but which is a liquid at a temperature of 15° C or above, and which keeps its biscuit consistency on storage at temperatures suitable for ice confections and upon subsequent consumption, comprising a mixture consisting essentially of particles of baked biscuit and at least one fat, wherein the fat is selected from the group consisting of partially hydrogenated vegetable oil, unmodified coconut fat, fractionated palm oil, partly fractionated milk fat and mixtures thereof, wherein the mixture contains 20 to 60% by weight of the biscuit particles and 40 to 80% by weight of the fat and wherein the fat has a solid fat content of about 95% at 10° C and about 0% at 25° C.

6. The biscuit mass of claim 1, wherein a portion of the biscuit particles is replaced by a dry powder ingredient selected from the group consisting of cocoa, cereals, milk, nuts, coffee and combinations thereof.

7. A composite frozen confection which comprises a coating, core or inclusion of the biscuit mass of claim 1 and an ice confectionery associated therewith.

8. The composite frozen confection of claim 7, in which the ice confectionery is an aerated ice composition, aerated ice cream, sherbet or sorbet or an ice yogurt having a soft texture.

9. The composite frozen confection of claim 7, in which the ice confectionery is aerated to an overrun of between 40 and 150%.

10. The composite frozen confection of claim 7, in which the ice confectionery is aerated to an overrun of between 80 to 120%.

11. The composite frozen confection of claim 7, in which the ice confectionery is extruded and includes a colored ice cream, sherbet, sorbet or ice yogurt having a color that is different from that of a perfume or flavoring composition which is co-extruded with the ice confectionery so as to produce a composite, marbled or spotted body having a substantially soft texture.

12. The composite frozen confection of claim 11 wherein the flavoring composition is selected from the group consisting of a syrup, sauce, small inclusion particles and combinations thereof, wherein the small inclusion particles are selected from the group consisting of nuts, chocolate, dried fruit and combinations thereof.

13. The composite frozen confection of claim 11, which comprises additional edible materials to impart different textures to the confection.

14. The composite frozen confection of claim 13, wherein the additional edible materials include fat-based crispy material, chocolate or a confectionery coating.

15. The composite frozen confection of claim 7, in the form of a stick-bar, a cone, a sandwich, a cup, a bulk, a cake, a portion or a bar.

16. A process for manufacturing a composite frozen confection comprising a biscuit mass as a coating, core or inclusion and ice confectionery, which comprises reducing a biscuit or biscuit crumbs to a particulate form, admixing the resulting particles with a fat at a temperature of between 25° C and 35° C to form a homogeneous mass consisting essentially of particles of baked biscuit and at least one fat, and bringing the ice confectionery and the biscuit mass into contact to form the composite confection.

17. The process of claim 16, wherein the frozen ice confection is produced by molding or extrusion and which further comprises coating the frozen ice confection with the biscuit mass.

18. The process of claim 16, which further comprises forming the frozen confection as a shell in a mold and injecting or filling the biscuit mass into the shell.

19. The process of claim 16, which comprises forming a shell by dosing the biscuit mass from the bottom to the top in a mold at a temperature of from 20 to 45° C. according to the type of fat used on a regular molding line, holding the mold to form a solid shell of the biscuit mass, and sucking back the biscuit mass from the mold to form an open cavity in the shell, and dosing an ice confectionery into the open cavity of the shell.

20. The biscuit mass of claim 6, wherein the cocoa, cereals and milk represents from 1 to 50% by weight of the particles and powder.

21. The biscuit mass of claim 6, wherein the nuts and coffee represents from 0.5 to 15% by weight of the particles and powder.

EVIDENCE APPENDIX

EXHIBIT A: Final Office Action dated February 7, 2007

EXHIBIT B: Advisory Action dated May 15, 2007

EXHIBIT C: CA Patent No. 950750 to Hegadorn et al. ("*Hegadorn*"), cited by the Examiner in the Office Action dated February 7, 2007

EXHIBIT A



UNITED STATES F

ND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/820,880	04/09/2004	Adrianus Cornelis Kruik	88265-7114	9267
29157 7590 02/07/2007 BELL, BOYD & LLOYD LLP P.O. Box 1135 CHICAGO, IL 60690				
			EXAMINER TRAN LIEN, THUY	
			ART UNIT	PAPER NUMBER
			1761	5-7-07
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		02/07/2007	PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

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BELL, BOYD & LLOYD
INTELLECTUAL PROPERTY DOCKET

FEB 19 2007

ATTY: hnb-myB
DOCKET #: 112707-

584

Office Action Summary

Application No.

10/820,880

Applicant(s)

KRUIK ET AL.

Examiner

Lien T. Tran

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 November 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 6-21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 6-21 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____.

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Claims 1, 6-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Canadian patent 950750.

Patent no. 950750 discloses pre-baked pastry crusts. The crust comprises about 60-90% dehydrated pre-baked pastry crumbs, 7-25% fat and 0-20% binder material. The binder material may be any sugar, hydrolyzed cereal solids, starches, cellulose, gums or combinations of any of these. The fat may be melted fat or powdered fat. The fat suitable for use can be any of the commercially available fats or hydrogenated vegetable oils.

The patent does not specifically disclose biscuit, the properties as recited in claim 1, the amount of fat claimed, the property of the fat, the inclusion of other ingredients in the mixture of baked pastry and fat, the amount of overrun as in claims 9-10, the making of the confection as in claims 11, 17, the inclusion of other material in the ice confection as in claims 12-14, the form of the confection as in claim 15 and the mixing temperature as in claim 16

The patent discloses using baked crumbs which is a baked product. Biscuit is a baked product; thus, the two particles are the same because the claims have not set forth any difference between the biscuit particles and the baked particles in the patent. Furthermore, it would also have been obvious to use other baked particles depending on the taste and flavor wanted. When baked particles are mixed with the fat, it is obvious the mixture will have the same property as in claim 1 because the same materials are used. It is also obvious the fat will have the solid fat content as claimed because the patent disclose the same fat as claimed. It would have been obvious to

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vary the fat content when desiring to alter the taste, texture, consistency of the mixture. It would also have been obvious to add other food ingredients to enhance the taste of the product; the selection of the type of ingredients and the amounts can vary depending on the taste and flavor desired. It would also have been obvious to combine a frozen confection with the shell disclosed in the patent because it is well known to place frozen confection in pie shell as discussed on line 4 of page 1 of the patent. The type of confection selected depends on the taste and flavor wanted and would have been an obvious matter of choice. It would have been obvious to use any known method to make the frozen confection; both molding and extrusion are well known in the art. It would also have been obvious to have any varying percent of aeration depending on the texture desired for the product. It would have been obvious to include other inclusion to enhance the taste of the ice confection; this is notoriously well known in the art. It would have been obvious to form the shell in any form depending on the look wanted. It would have been within the skill of one in the art to determine the appropriate temperature of the fat so that it can be easily mixed with the particles. This can readily be determined through routine experimentation. It would have been obvious to form the ice confection as the shell or the baked particles as the shell depending on the type of confection wanted. Frozen desserts come in many different shapes and forms; one can readily see this in a supermarket or ice cream novelty store. It would have been obvious to one skilled in the art to make the various forms claimed because they are well known in the art. It would have been within the skill of one in the art to

determine the temperature to pour the particles through routine experimentation in absence of showing of unexpected result or criticality.

In the response filed 11/20/06, applicant argues Hegadorn teaches away from the claims because Hegadorn teaches using a higher amount of pastry crumbs, a lower amount of fat and preferably a binder. This argument is not persuasive. The amount of crumbs in the Hegadorn mixture is 60-90%; this range falls within the one claimed. Thus, Hegadorn does not necessarily teach higher amount of pastry crumbs and the amounts of crumbs include those claimed. As to the binder, this component is optionally; thus, Hegadorn does disclose mixture without the binder. As to the amount of fat, the rejection takes the position that it would have been obvious to vary the fat content to alter the taste, texture, consistency and fat content of the product. Applicant does not present evidence or reasoning why this would not have been obvious to one skilled in the art. Food products having varying range of fat content are notoriously well known in the art. For example, cookies come in variety of fat content as fat free, low fat, and high fat; the same is true for many other types of food product. A few examples include ice cream, cake, cracker, pie, pastries etc... Applicant also argues Hegadorn fails to disclose or suggest the processing step of bringing an ice confectionery and the biscuit mass. Hegadorn teaches the crust mixture is used make dessert including frozen desserts etc.. This clearly suggests to one skilled in the art to use the mixture with frozen confectionery to make a frozen dessert. For example, one can use the crumb mixture with ice cream to make an ice cream pie. The selection of the type of filling to be used with the crumb mixture would have been an obvious matter of choice.

Applicant's arguments filed 11/20/06 have been fully considered but they are not persuasive.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Monday, Wed-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Cano Milton can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1761

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

February 5, 2007

Leidman
LIENTRAN
PRIMARY EXAMINER
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EXHIBIT B



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/820,880	04/09/2004	Adrianus Cornelis Kruik	88265-7114	9267

29157 7590 05/15/2007
BELL, BOYD & LLOYD LLP
P.O. Box 1135
CHICAGO, IL 60690

EXAMINER

TRAN LIEN, THUY

ART UNIT PAPER NUMBER

1761

NOTIFICATION DATE DELIVERY MODE

05/15/2007

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATENTS@BELLBOYD.COM

RECEIVED
BELL, BOYD & LLOYD
INTELLECTUAL PROPERTY DOCKET

MAY 16 2007

ATTY: *MB-myb*

DOCKET #: *112101-*

584

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/820,880	Applicant(s) KRUIK ET AL.	
	Examiner Lien T. Tran	Art Unit 1761	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 03 May 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: none.
Claim(s) objected to: none.
Claim(s) rejected: 1 and 6-21.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: applicant's argument is not persuasive for reason of record.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____


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PRIMARY EXAMINER
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EXHIBIT C

SUBSTITUTE
REMPLACEMENT

SECTION is not Present

Cette Section est Absente

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This invention relates to pre-baked pastry crusts. Thus it is concerned primarily with the quick and easy preparation of desserts, such as cream pies, fruit pies, tarts, lemon meringue pies, frozen desserts, etc., in which a crust forms an integral part of the dessert. Recently there has been wide consumer interest in pre-baked crust for use in forming pies with a gel or pudding-type filling which can be poured into a pre-baked pie shell. These pies do not then require additional baking. The demand for these pre-baked crusts has been spurred on by the growing number of puddings and pie fillings (fully prepared, instant, frozen, etc.,) currently available to the consumer.

The production and sale of pre-formed, pre-baked pie shells or pie shell sections has not proven to be a commercially profitable undertaking since more than one-half of the pre-formed shells or sections are normally broken before they reach the consumer. Additionally, these pre-formed shells limit the housewife to making a pie in the size of the pre-form. This invention provides a means for enabling the housewife to prepare a crust structure of any desired shape or size. This crust may then be filled with a gel or pudding-type filling and served as a dessert without the necessity of further baking. It is estimated that the average housewife making use of this invention can prepare a pie-type dessert in about 15 minutes. This represents a savings of upwards to 45 minutes over the customary method of preparing and rolling dough and then baking the dough to form a pastry crust.

A method that is currently available to the housewife for quickly producing crusts is the use of cracker crumbs (e.g. graham cracker crumbs); however, this produces a cracker crumb crust structure which is markedly different from a true pastry crust in appearance, color, taste and mouth-feel.



It is an object of this invention to permit the quick and easy preparation of pre-baked crusts having the appearance, taste and mouth-feel of true pastry crust.

It is another object of this invention to produce a mix which may be readily molded to form a pre-baked crust of any desired shape.

Yet another object of this invention is to permit the convenient preparation of pies having a gel or pudding-type filling.

10 Additional objects and advantages of the invention will be obvious from the description herein.

In general, this invention is directed to a mix consisting of pre-baked pastry crust crumbs, together with a fat and preferably an edible binder to form a mix which may be readily molded into a pre-baked crust. The crust produced under this invention possesses the texture, taste and mouth-feel of a crust made by a conventional baking process. It is also contemplated that a crust produced with the pre-baked crumbs of this invention could be baked for a short
20 time subsequent to the molding operation in order to obtain a harder crust.

The pre-baked crumbs of this invention are produced by forming a baked crust, by any household or commercial method, and then comminuting the crust into crumbs. The crumbs, which are baked in such a manner so as to obtain a golden brown color and a moisture content of between about 0.5% to 5%, are then spray coated with a liquid fat and gently mixed with a binder. The crumb mix so produced can be packaged and sold to the consumer with instructions to
30 mold the mix into a suitable container (e.g. pie plate).

Alternatively the baked crumbs may be packaged and the consumer instructed to combine the crumbs with a liquid fat (e.g. melted butter, salad oil, etc.), and to then mold

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the resulting crumb mix into the container. Preferably, but not necessarily, the crumbs are also combined with an edible binder material (e.g. granulated sugar) which aids in the formation of a firm crust.

10 In accordance with the present invention a short dough composition is formulated to include about 45% to 70% flour, 0% to 4% salt, 20% to 50% shortening and 5% to 25% water. Short dough is the type of dough normally used for making crusts and it may also include various supplementary ingredients such as eggs, milk, etc. which have as their primary function the production of color in the baked crust.

The flour used in the dough composition can be any of the common cereal flours such as wheat, corn, rye and the like. The shortening used in this invention can be comprised of any of the animal or vegetable fats, hydrogenated vegetable oils, other edible fatty substances, or combinations of these which have heretofore been known to and employed by those skilled in the baking art.

20 The salt as well as other flavoring ingredients (e.g. spices) may be added to the short dough composition itself or alternatively these ingredients may be added instead to pre-baked crumbs together with the liquid fat material. The water used to prepare the dough is preferably iced water, or a blend of water and ice, and is added in an amount sufficient to permit the optimum, cohesive dough but insufficient to permit excessive melting or smearing of the shortening throughout the dough.

30 The pre-baked crumbs are produced by cutting the shortening into a flour-salt mixture and then briefly blending the mix to form a dough. If desired, the salt may instead be dissolved in the water which is to be added to the dough. The shortening is cut into the flour-salt mix in such a manner that the particles of shortening will not be

too thoroughly dispersed throughout the final moistened dough. The dough is then sprinkled with water and kneaded until the dough balls. Preferably the dough is refrigerated for a period of from about 20 to 30 minutes before it is rolled out to sheet form having a thickness of from about 1/16" to 1/4" and baked for 3 to 20 minutes at about 400°F. to 450°F. After removal from the oven the crust is cooled to about ambient conditions and then comminuted into crumbs by pressing through the openings of a sieve or by grinding in one of the commercially available mills. The baking can be done in any conventional baking oven. The exact baking conditions depend upon such variables as the particular dough composition, the exact thickness of the rolled dough and the color desired for the baked dough. However, one skilled in the art will readily be able to select the proper operating conditions.

The crumbs produced by this procedure preferably include a major portion of flake type crumbs together with a lesser amount of smaller granular shaped crumbs. The crumb consistency directly affects the mouth-feel and structural stability of the pre-baked pastry crust in that the flake type crumbs enable the crust of this invention to possess both the appearance and mouth-feel of a true pastry crust and the combination of flake and granular crumbs permit the formation of a crust which will not readily crumble and fall apart as does the well-known cracker crumb crust.

The crumbs produced in accordance with this invention possess the golden brown color of true pastry crumbs and are dehydrated to a reduced moisture content of between about 0.5% to 5% by weight and preferably of from 1% to 3%. At this low moisture content the crumbs are shelf stable over a relatively long period of time.

The pre-baked and dehydrated crumbs produced by this invention are adapted to be mixed with a fat and an

edible binder material and molded into a desired crust structure. The crumbs may be combined with the fat (e.g. spray coating with a melted fat or blending with a powdered fat), mixed with the binder and packaged or alternatively the dehydrated crumbs may be immediately packaged and sold to the consumer together with instructions to add a liquid fat either with or without an additional binder material before molding. In either event, the crumb mix from which the crust is molded includes on a weight basis about 60% to 90% dehydrated pre-baked pastry crumbs, 7% to 25% fat and 0% to 20% binder material and preferably about 60% to 80% dehydrated pre-baked pastry crumbs, 7% to 25% fat and 8% to 20% binder material.

The liquid fat suitable for use can be any of the commercially available and acceptably stable animal fats or hydrogenated vegetable oils as well as salad oils and melted butter or margarine. The edible binder material may be any of the sugars (e.g. sucrose), hydrolyzed cereal solids (e.g. corn syrup solids), starches, cellulose, gums or combinations of any of these. When the binder material is to be packaged with the pre-baked and dehydrated crumbs we prefer to use corn syrup solids in which the percentage of reducing sugars, calculated as dextrose, is low. For example, a corn syrup solid having a low dextrose equivalent (D.E.) of 24 is highly desirable since such a material has low sweetness impact, is not hygroscopic and will not cake or become lumpy when packaged.

The crumb mix of this invention can be readily molded to form a crust covering the contour of any shape container such as a pie plate. A molding element such as a fork or a measuring cup is useful in molding and pressing the crumb mix to fit the container. If desired, the crust structure can be made harder by baking for about 3 minutes at 325°F. after the molding operation is complete. Pref-

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erably the crust should be refrigerated for a short period of time until it is ready for use.

Example I

Pie Dough Composition:

Flour (wheat)	70.0 grams
Salt	1.8 grams
Shortening (hydrogenated cottonseed oil)	39.0 grams
Water (iced)	17.0 ml.

10 The shortening is cut into the flour-salt mixture and mixed in with a standard household mixer operating at a low speed for 30 seconds. Water is sprinkled over the mix and blended with a fork until the dough balls. The dough is then refrigerated for 25 minutes. The dough is next rolled out to about 1/16" thickness, placed in an 8" pie tin, and baked for 15 minutes in a preheated 425° oven. The pie shell is cooled and pressed through the openings of a U.S. Standard sieve equipped with 1/4" square openings. The resultant crumbs possess a moisture content of about 3% by weight. The crumbs are then cooled to 40°F. and spray coated, using a hand sprayer, 20 with 13.0 grams of hydrogenated vegetable oil (coconut-palm oil mixture). The coated crumbs are then gently mixed with 20 grams of corn syrup solids (24 D.E.). This crumb mix is packaged in a metal foil laminate pouch and subsequently molded into an 8 inch pie tin.

Example II

Pie Dough Composition

30	Flour (wheat)	93.0 grams
	Salt	2.5 grams
	Shortening (hydrogenated cottonseed oil)	46.5 grams
	Water (iced)	21.0 ml.

A rolled dough about 1/16" thick is produced in accordance with the method set forth in Example I. The dough is then placed on a pre-heated steel band and passes through an oven having air recirculated at 400°F., for about 5 minutes to produce a crust having a golden brown color and a moisture content of about 2%. This crust is subsequently ground in a

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commercial comminuting mill and the dehydrated crumbs are then packaged in a metal foil laminate pouch. Subsequently the crumbs are removed from the pouch and mixed with 25 grams (2 tablespoons) of granulated sugar (sucrose) and 45 ml. (3 tablespoons) of melted butter. This crumb mix is then pressed into a 9 inch pie tin.

The crust produced by this invention looks and tastes like a true pastry crust which may be used in any number of homemade desserts.

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It will be apparent that there are variations and modifications of this invention and that the Examples, preferred proportions and ingredients, and typical operating procedures may be varied without departing from the spirit of the invention.

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The embodiments of the invention in which an exclusive property or privilege is claimed are defined as follows:

1. A method for producing a pre-baked pastry crust consisting of the steps of:
 - (a) formulating a pastry dough;
 - (b) rolling the dough into sheet form;
 - (c) baking the dough to produce a dehydrated crust having a moisture content between 0.5% and 5%;
 - (d) comminuting the crust into crumbs;
 - (e) making a crumb mix free of moisture and consisting of 60% to 80% of the dehydrated crumbs, 7% to 25% fat and 0% to 20% of a binder material which is a sugar, a hydrolyzed cereal solid, a starch, a cellulose, an edible gum or a combination thereof;
 - (f) molding the crumb mix into a pastry crust structure.
2. A method according to claim 1, wherein the crumbs include a major portion of flake type crumbs.
3. A method according to claim 1, wherein the dehydrated crumbs are sprayed coated with a liquid fat and mixed with the binder material.
4. A method according to claim 3, wherein the binder material is corn syrup solids having a low dextrose equivalent.
5. A method according to claim 1, wherein the crumb mix includes as binder a granulated sugar binder and the fat is melted butter or melted margarine.
6. A method according to claim 1, wherein the pastry dough contains by weight 45% to 70% flour, 0 to 4% salt, 20 to 50% shortening and 5 to 25% water.



ABSTRACT OF THE DISCLOSURE

A mix including pre-baked pastry crust crumbs is produced by forming a pastry dough in the ordinary manner, heating the dough in an oven to produce a baked and dehydrated crust, comminuting the crust into crumbs and then mixing the crumbs with a liquid fat and an edible binder. Any size or shape pastry crust can be formed from the mix by simply molding the crumb mix into the desired size container (e.g. pie tin). The crust produced from these crumbs has the appearance and mouth-
10 feel of true pastry crusts.

RELATED PROCEEDINGS APPENDIX

None.